72-64

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-646

JAMES D. OREE,

Petitioner

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

NO.

JAMES D. OREE,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, JAMES D. OREE, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The United States Court of Appeals for the Second Circuit, without opinion, affirmed the judgment of the United States District Court for the Southern District of New York [Appendix A]. The opinion of the United States District Court for the Southern District of New York is unreported, and is printed in Appendix B.

JURISDICTION OF THIS COURT

[a] The judgment of the United States Court of Appeals affirming the judgment of conviction of petitioner was entered on September 27, 1972.

[b] Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the facts and surrounding circumstances warrant the granting of a new trial under Rule 33 of the Federal Rules of Criminal Procedure.

RULES OF COURT

Rule 33 of the Federal Rules of Criminal Procedure.

"The court on motion of a defendant may grant a new trial to him if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period."

STATEMENT OF THE CASE

On March 26, 1970, petitioner was convicted on two counts of an indictment by a jury with four others, for violations of the Federal Narcotics Laws, Title 21 of the U.S.C. §173-174. The trial Court sentenced petitioner to a term of imprisonment for ten years. Petitioner's conviction was affirmed by the United States Court of Appeals for the Second Circuit. *United States v. Bellamy*, 436 F. 2d 542. Petition for certiorari was denied by this Court on April 26, 1971. (402 U.S. 929).

Thereafter, petitioner moved to vacate his conviction pursuant to Title 28 of the U.S.C., §2255, or, in the alternative, for an Order granting a new trial on the basis of newly discovered evidence pursuant to Rule 33 of the Federal Rules of Criminal Procedure. The newly discovered evidence consisted of an affidavit executed January 9, 1968 [19a] by Dennis Copeman, a co-defendant, who testified for the Government in the trial. In the affidavit Copeman states:

> "I never saw Mr. Oree in Apt. 3G until he was brought to Apt. 3G by the Federal Agents."
>
> "I never saw Mr. Oree in possession of narcotics."
>
> "I never heard Mr. Oree discuss narcotics."
>
> "I never had any conversation with Mr. Oree on that day or any other day regarding narcotics."

The circumstances surrounding the execution of the discovery of the Copeman affidavit are set forth in the petition accompanying the motion. [5a - 9a, and 20a - 24a]. Dennis Copeman gave the affidavit to an associate of Irwin Klein, petitioner's original attorney on January 9, 1968. Klein was later substituted by trial counsel, Howard Diller. Petitioner claimed that the existence of the Copeman affidavit was not known to him or his trial counsel until October 30, 1970, when at a chance meeting at the Atlanta Penitentiary, Klein told petitioner of the existence of the Copeman affidavit.

It appears that shortly after petitioner retained Klein, he was informed by Klein that Klein had obtained written statements from other persons arrested with petitioner and these statements exonerated him. Petitioner was under the impression that Klein was referring to those persons who were at liberty at the time, and not defendants in the case. Copeman at that time was incarcerated on unrelated charges [7a]. Petitioner also claims that he relied completely upon trial counsel to obtain evidence and to try the case [8a]. Trial counsel did not request the file which contained the Copeman affidavit from petitioner's original attorney.

REASONS FOR GRANTING THE WRIT

A motion for a new trial based upon newly discovered evidence has been said to be *sui generis*. While it may be fair to

say that meritorious motions based upon this ground are few (See Federal Rules of Criminal Procedure, N.Y.U. Institute 1946, 230), these few cases alone justify the existence of a means to undo injustice.

The following are the essential requisites for a motion for a new trial based on newly discovered evidence:

> [1] The evidence must have been discovered since the trial.
>
> [2] The failure to produce the evidence at trial was not due to lack of diligence on defendant's part.
>
> [3] The evidence relied on must not be merely cumulative or impeaching.
>
> [4] It must be material to the issues in the trial, that it would probably produce a different verdict if a new trial were granted.

United States v. Costello, 255 F. 2d 876 (2nd Cir.), cert. den. 357 U.S. 937 (1958).

In the case at bar, the evidence in question is not cumulative but it is impeaching, which, under the aforementioned requirement would apparently prevent a new trial. It is impeaching evidence of a serious nature, especially under the circumstances of this case. Dennis Copeman, the Government's principal witness, was a convicted felon and parole violator serving a prison term. His pretrial affidavit is in direct conflict with his testimony at trial. In *Mesarosh v. United States*, 352 U.S. 1, 9, the Court made the following statement as to any newly discovered evidence affecting a witness' credibility at trial:

> "Such an allegation by the defense ordinarily will not support a motion for a new trial, because new evidence which is 'merely cumualtive or impeaching' is not, according to the often-repeated statement of the courts, an adequate basis for the granting of a new trial."

However, under the facts of this case, it is submitted this is not a case where the ordinary rule for not granting a new trial applies, and that the evidence here does not come within the general interdiction that the newly discovered evidence which is merely impeaching is ordinarily insufficient to warrant a new trial.

"Diligence" such as defendant must exercise in discovering evidence, is a relative term incapable of exact definition depending on light of peculiar circumstances. *People v. Williams*, 368 P. 2d 353 (Cal. 1962). Among the circumstances present in the instant case was the reliance of petitioner Oree upon trial counsel, Howard Diller, to consult with Irwin Klein and obtain from him the total file including any affidavits favorable to petitioner's case. At the time of trial, petitioner was not aware of Copeman's affidavit although Klein had previously mentioned to petitioner that he had obtained information from other persons involved. It was petitioner's impression that this applied only to those persons who were at liberty and not to Copeman and Hunter who had been incarcerated for an unrelated crime. Up until the time Copeman was severed as a defendant and testified for the Government, there was no reason for petitioner to believe that Copeman would be a witness for the prosecution.

The remaining requirement is that the newly discovered evidence must be of such a nature that in a new trial it would probably produce a different verdict. See *United States v. Miller*, 411 F. 2d 825, 830, 831 (2nd Cir. 1969) and cases therein cited. Without being able to use Copeman's affidavit during cross-examination, the jury was deprived of information which they could legitimately use in judging his credibility. This was a case where the jury had to determine whether to believe the word of Copeman, for he was the Government's principal witness, or reject it. Copeman was a material witness. His trial testimony contradicted by his prior sworn statement, plus his long criminal record, which weighs heavily in connection with credibility, could have well produced a state of mind with the jurors that Copeman was not telling the truth and therefore the Government had not established guilt beyond a reasonable doubt.

A different appraisal of Copeman's worthiness of belief might well lead to a different result in a new trial. Without a new trial, the verdict will be forever beclouded by the possibility that the jury unwittingly acted upon false testimony of an undisclosed perjurer and convict.

CONCLUSION

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Raymond A. Brown, Esq.
Counsel for Petitioner
26 Journal Square
Jersey City, New Jersey

APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-seventh day of September, one thousand nine hundred and seventy-two

Present: HON. PAUL R. HAYS
HON. JAMES L. OAKES
HON. WILLIAM H. TIMBERS

Circuit Judges,

United States of America,

Plaintiff-Appellee,

v.

James D. Cree,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with costs to be taxed against the appellant.

A. DANIEL FUSARO
Clerk

APPENDIX "B"

FILED JUNE 22, 1971

E.P. CH 3 MEMO 439

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

69 Cr. 424
71 Civ. 400
E.L.P.

JAMES D. OREE,

Petitioner.

PALMIERI, J.

This is a motion by petitioner, pursuant to Title 28, United States Code, Section 2255, for an order vacating the judgment of conviction or, in the alternative, for an order granting a new trial, pursuant to Rule 33, Federal Rules of Criminal Procedure. The alleged grounds of the motion are newly discovered evidence and failure by the Government to disclose exculpatory evidence. The relief sought is not supported on either ground. The alleged newly discovered evidence consists of an affidavit of Dennis Copeman a co-defendant whose case was served. He pleaded guilty and testified for the Government at the trial concerning the details of Oree's narcotics operation and the events of November 28, 1967, the date on which Oree and his co-defendants were arrested, and the report of an investigating narcotics agent, who did not testify at trial. These papers lack the necessary persuasiveness or solidity to sustain petitioner's claim.

The affidavit of Copeman purport to absolve the petitioner and was allegedly in the hands of an attorney who represented Oree in the early stages of the case but not at trial—Irwin Klein, Esq. This affidavit was available to Oree when new counsel was substituted and could have been readily obtained by the

exercise of minimal diligence. If neither Oree nor his trial counsel sought out this file it was plain negligence and its discovery after trial can hardly be raised to the dignity of a reason for a new trial. It is clear that with due diligence this file could have become available to the petitioner. See *United States* v. Capace, 387 F. 2d 537 (2d Cir. 1961), *cert. denied*, 362 U.S. 374 (1961): *Wright v. United States*, 353 F. 2d 362 (9th Cir. 1965), *United States v. Barbera*, 213 F. Supp. 923 (S.D.N.Y. 1963).

Additionally, the petitioner has failed to offer the slightest evidentiary basis for the claim that Copeman's affidavit was known to the Government and suppressed by it. The affidavits submitted by the Government make it clear that this affidavit was not known to the Government attorneys. Nor can the petitioner claim that there was suppression of the existence of an additional investigating narcotics agent, Richard C. Johnson, who might have contradicted the agents who testified. Quite the contrary is true. Agent Johnson's report makes it clear that additional narcotics were found in Oree's car and this evidence far from exculpating Oree, would have had a seriously disadvantageous effect upon his *claim of innocence*.

Lastly, there was evidence at the trial, apart from Copeman's testimony, which seriously involved petitioner in the illicit narcotics business. At best the petitioner's papers do no more than indicate that the Copeman affidavit could have been used to impeach Copeman as a witness and is consequently insufficient as a basis for a motion of this character. See *United States v. Polisi*, 416 F. 2d 573, 576-577 (2d Cir. 1969).

The motion is denied. It is so ordered.

Dated: New York, N.Y.
June 22, 1971

EDMUND L. PALMIERI
U.S.D.J.